EDITOR'S NOTE

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90-627

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PASQUALE ACIERNO,
Petitioner,

v.

MICHAEL CUNNINGHAM,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Robert L. Sheketoff
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QUESTION PRESENTED FOR REVIEW

1. Is a presumption of prejudice appropriate when a defendant demonstrates that his counsel at the sentencing phase of his trial was ineffective, and if not what test of prejudice should be employed?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner Pasquale Acierno prays that this Honorable Court grant a writ of certiorari to review the order of the United States Court of Appeals for the First Circuit entered in this case on July 17, 1990.

Opinions Below

The petitioner Acierno was tried in Belknap County Superior Court in New

Hampshire, and the jury returned guilty verdicts on October 21, 1985. On July 28, 1986 the Supreme Court of New Hampshire ordered the appeal dismissed. The petitioner filed a state petition for a writ of habeas corpus which was heard and then denied on April 21, 1988 by Judge Hollman of the New Hampshire Superior Court. The order and opinion of Judge Hollman is reproduced in the Appendix at A-1 to A-28. The appeal from that order was summarily affirmed by the New Hampshire Supreme Court on September 6, 1988.

The petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. On April 18, 1990 Chief Judge Shane Devine issued an order and judgment denying the petition. Said order and judgment are reproduced in the

Appendix at A-29 to A-47. On May 3, 1990 Chief Judge Devine issued an order denying the petitioner's request for a certificate of probable cause to prosecute his appeal. Said order is reproduced in the Appendix at A-48 to A-49. The petitioner then sought a certificate of probable cause from the First Circuit Court of Appeals. On July 17, 1990 a panel of the First Circuit issued an order denying the request. Said order is reproduced in the Appendix at A-50.

Jurisdiction

The order of the United States Court of Appeals for the First Circuit was entered on July 17, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision Involved

Section One of the Fourteenth Amendment provides in relevant part:

> ...No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

The United States District Court for the District of New Hampshire had jurisdiction to consider petitioner's habeas corpus petition pursuant to 28 U.S.C. §2254.

On October 21, 1985 the evidence concluded in the petitioner's state court trial, and the jury heard argument and the court's charge. The jury reached its verdicts and announced them in open court. The jury was then polled. At that point the trial judge asked counsel if they were ready for sentencing. See Tr. 10/21/89:320. Defense counsel answered no, pointing out that the probation report

was not yet completed. The prosecutor stated that it was in fact on file and that the state was ready for sentencing. Tr. 10/21/85:320. Defense counsel was then given an opportunity to consult with the petitioner and review the report. See Tr. 10/21/85:320. This recess lasted for at most fifteen minutes. See Tr. 8/10/87:86.

The sentencing hearing then proceeded with the defense conceding there were no factual errors in the probation report. The prosecutor made his recommendation to the court, and defense counsel was given an opportunity to be heard from. The defense lawyer informed the court that there would be an appeal and that he would ask for bail pending appeal; he had nothing else to say for the remainder of the hearing. See Tr. 10/21/85:323. The victim's attorney next addressed the court

describing the "tremendous ordeal" his client had been through. The petitioner was then given an opportunity to speak. The court fully adopted the prosecutor's recommendation and imposed a committed sentence of not more than eight years nor less than four, and a similar consecutive sentence which was suspended.

At the state court hearing on petitioner's state habeas corpus petition trial counsel frankly admitted that what occurred at sentencing was the result of surprise that the probation report was completed and lack of time for appropriate preparation. See Tr. 8/10/87:84-89.

Reasons Why the Writ Should Be Granted

This case presents the important and recurring issue of the appropriate manner of analyzing a defendant's claim that he was denied the effective assistance of counsel at the sentencing phase of his

trial. In United States v. Cronic, 466 U.S. 648, 659 n.25 (1983), this Court addressed the concept of presumed prejudice when counsel is "totally absent." The courts of appeals have apparently narrowly construed this presumption of prejudice concept. See Fink v. Lockhart, 823 F.2d 204, 206 (8th Cir. 1987). In Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984), prejudice was presumed where counsel did not participate at all in the trial.

In this case, trial counsel's silence at sentencing was not a tactical choice by his own admission. Thus the problem of analyzing prejudice at sentencing is squarely presented. How does a defendant demonstrate a reasonable probability of a lesser sentence. In Gardiner v. United States, 679 F.Supp. 1143, 1147 n.7 (D.Me. 1988), the sentencing judge stated

"...without knowing what reasonably competent counsel might have said or how he or she would have said it, the Court cannot tell what its reaction would have been to the presentation."

ARGUMENT

I. THE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING STAGE OF HIS CASE IN STATE COURT.

Under the test adopted in Strickland v. Washington, 466 U.S. 668 (1984), a defendant is entitled to relief if he can demonstrate (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) that he was prejudiced thereby. In most cases, claims of ineffective assistance of counsel falter on the first hurdle, since significant deference is paid to strategic choices made by trial counsel. Here,

however, trial counsel frankly admitted at the state court hearing on Mr. Acierno's state habeas corpus petition that what occurred at sentencing was the result of surprise that the probation report was completed and lack of time of appropriate preparation. See Tr. 8/10/87:84-89. There simply was no strategic choice made that it was in the petitioner's best interests not to make any presentation on his behalf at sentencing. Compare Darden v. Wainwright, 106 S.Ct. 2464, 2474-75 (1986). Caving in to a perception that the trial judge is in a hurry is no justification or excuse for proceeding unprepared and failing to utter a single word on the defendant's behalf. The constitutional right to counsel includes the sentencing phase of a trial because of the necessity of counsel's assistance in marshalling the facts, introducing

evidence of mitigating circumstances, and in aiding the petitioner to present his case. See Mempha v. Ray, 389 U.S. 128, 135 (1967). Here, counsel's representation at sentencing fell below any objective standard of reasonableness.

As to the prejudice issue, the petitioner asserts that a presumption of prejudice would be proper here since counsel's representation was so deficient as to amount to no representation at all. See United States v. Cronic, supra at 659 n.25; Blake v. Kemp, 758 F.2d 523, 533-45 (11th Cir.), cert. denied, 474 U.S. 998 (1985). Such a presumption of actual prejudice was adopted by Judge Carter in Gardiner v. United States, 679 F.Supp. 1143 (D.Me. 1988) (a case quite similar to the case at bar), in reaching his decision that a new sentencing hearing was constitutionally required.

Sentencing is perhaps the most discretionary phase of a criminal trial. A presumption of prejudice is well suited to such a situation where defense counsel has proved incompetent. Attempting to divine what sentence would have been imposed if counsel had been adequate seems particularly speculative. All that is required here is an appropriate rehearing on sentencing and not a new trial.

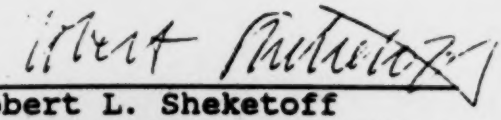
But assuming arguendo, that Mr. Acierno must demonstrate a reasonable probability that the trial judge would have imposed a lesser sentence if counsel had been adequate, the petitioner here meets that burden. It cannot be the state of the law that if a defendant does not receive the maximum penalty permitted by statute he has no claim of prejudice. Here, the trial judge did not on his own make some adjustment from the

prosecution's recommendation, but rather adopted it in full. Second, there was massive and powerful mitigating character evidence that was not available to the trial judge. In such circumstances as these, the petitioner was denied his Fourteenth Amendment rights to the effective assistance of counsel.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,
By his Attorney,



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APPENDIX

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, ss. SUPERIOR COURT

PASQUALE ACIERNO

vs.

RONALD POWELL, COMMISSIONER,
NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS
No. 86-E-00376-0

ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

This order concerns a petition for writ of habeas corpus in which plaintiff claims that he is being deprived of his liberty at N.H. State Prison, because his Constitutional rights were violated at his trial and sentencing in the Belknap County Superior Court in October, 1985. In the instant proceeding, "plaintiff bears the burden of satisfying the court, by a preponderance of the evidence, that he is unlawfully confined." McNamara, 2 NH Practice, Criminal Practice & Procedure, §1012.

By indictments returned in August, 1984, plaintiff was charged with having committed two offenses of aggravated felonious sexual assault against Thomas Gravel. These charges resulted from an incident which occurred on the evening of July 31, 1984, at Silver Lake in Lochmere, N.H., where both the plaintiff and the victim's family owned summer homes. According to the indictments, through the application of physical force and superior physical strength, the plaintiff purposely attempted to have nonconsensual anal intercourse with the victim, and purposely engaged in nonconsensual sexual penetration with the victim by forcing him to perform fellatio upon the plaintiff.

At trial begun on April 16, 1985, the court declared a mistrial after Thomas Gravel, the State's first witness, testified that during the incident in question

plaintiff stated that he had made a boy in Florida "happy" by doing the same sort of thing to him as he was doing to Gravel. At plaintiff's second trial which began on June 11, 1985 and ended with verdicts of guilty to both indictments on June 14, 1985, the court also declared a mistrial after it learned that one of the jurors was employed at the Belknap County Farm. At the third trial, conducted for four days between October 15 and October 21, 1985, the jury returned guilty verdicts on both indictments. The court then proceeded to sentence plaintiff to two consecutive four to eight year terms, the second of which was suspended on good behavior.

After conviction, plaintiff was released on bail pending appeal, and filed a notice of appeal with the N.H. Supreme Court. After filing his notice of appeal based solely upon the alleged insufficiency

of the evidence to support the verdicts, plaintiff sought to expand the scope of appeal. In particular, plaintiff requested that the Supreme Court also consider whether his Constitutional rights had been violated when the trial court conducted unrecorded bench conferences with prospective jurors during voir dire, in the presence of counsel but outside the presence of the plaintiff himself.

On July 28, 1986, the N.H. Supreme Court dismissed plaintiff's appeal, stating that plaintiff's challenge with respect to the sufficiency of the evidence was without merit and that the attempt to include the issue of the unrecorded bench conferences during jury voir dire was untimely. At a show cause hearing on August 11, 1986, the court denied plaintiff's request for bail pending adjudication of a preliminary application for writ of habeas corpus which

counsel for plaintiff informed the court he would be filing. At the same time, the court ordered that defendant was to be committed forthwith.

On May 12, 1987, plaintiff filed an amended petition for writ of habeas corpus, which superseded the preliminary application. In this amended petition, plaintiff sets forth three grounds to support his contention that he is being unlawfully deprived of his liberty. As amplified by plaintiff's memorandum of law, these grounds are:

> 1. That unrecorded bench conferences held between the court and prospective jurors in the presence of counsel but outside the presence of plaintiff violated plaintiff's rights under the N.H. Constitution and under the Sixth and Fourteenth Amendments to the U.S. Constitution.
>
> 2. That, because the interpreter provided for plaintiff who is an Italian immigrant did not accurately and completely

translate substantial portion of the trial testimony, plaintiff only heard portions of the evidence, and was denied his rights to due process, confrontation, and assistance of counsel under both the U.S. Constitution and the N.H. Constitution.

3. That plaintiff was denied the effective assistance of counsel under both the Sixth Amendment to the U.S. Constitution and Part 1, Article 15 of the N.H. Constitution, because of his attorney's failure to secure an adequate literal translation by the interpreter of the evidence at trial, and to prepare for sentencing and present evidence and argument in mitigation as to plaintiff's lack of a prior criminal record, good character and reputation, and respect for the law.

By amended petition dated August 3, 1987, plaintiff added three additional reasons to support his claim that he is being unlawfully deprived of his liberty. Continuing in numbered sequence form the last ground in the first amended petition, the additional grounds contained in the

second amendment are as follows:

> 4. That the introduction of victim input information at sentencing created an impermissible risk that the sentencing decision was made in an arbitrary manner and violated the plaintiff's rights under the Eighth Amendment to the U.S. Constitution.
>
> 5. That the State either negligently or intentionally withheld from defendant the true results of a polygraph examination which it had performed upon the victim, Thomas Gravel, and that the failure to disclose this information, which strongly indicated deception on the part of the victim, deprived plaintiff of his Constitutional right to due process.
>
> 6. That New Hampshire's per se rule excluding the introduction of polygraph evidence effectively violated plaintiff's rights under the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment to the U.S. Constitution.

By motion dated December 8, 1987, plaintiff further amended his petition to enlarge the fifth ground described above.

In this amendment, plaintiff is apparently contending that the polygraph examiner inaccurately interpreted the Gravel test results and that the State failed to disclose this to plaintiff in violation of plaintiff's right to due process.

As to plaintiff's first contention, ten jurors answered affirmatively in response to questions asked by the court on jury voir dire. In each instance, the court conducted an unrecorded conference with the prospective juror at the bench. Although counsel was present at each of these conferences, the plaintiff was not. Seven of these prospective jurors were excused. The three who were not excused, #5, #9, and #11, all answered affirmatively to the same question -- whether any juror had a close friend engaged in law enforcement. Eventually, as a result of peremptory challenges, two of these three jurors were

excused. Only #9, Gerd Stewart, remained on the jury.

At no time did plaintiff through counsel or otherwise request a record at any of these bench conferences, or request that plaintiff be present at the bench while they were taking place. At no time during the trial did plaintiff through counsel or otherwise object to the fact that there had been no record of these conferences or that plaintiff had not been present at the bench when they were held. Moreover, the plaintiff failed to raise this issue in a timely fashion by direct appeal.

Jury voir dire was not an unfamiliar procedure to the plaintiff. He had been through two of them in the prior trials. The plaintiff's lawyer was an experienced trial attorney who had handled five to eight hundred felony cases and who knew the importance of jury voir dire. It is

implausible that he would not have challenged for cause any of the three jurors not excused by the court whose response raised a doubt about impartiality and fair-mindedness. Furthermore, plaintiff points to nothing specific to show that there was any prejudice to him as a result of the retention of any of these three jurors.

Moreover, at the show cause hearing on August 11, 1986, plaintiff's counsel brought to the attention of the court that one of the grounds for plaintiff's preliminary application for a writ of habeas corpus was the matter of these unrecorded bench conferences during jury voir dire when the plaintiff was not present. In revoking bail at this hearing, the court expressly found that, as to the grounds set forth in plaintiff's preliminary application for a writ of habeas corpus, the probabilities of success were minimal. The trial court

thereby implicitly found that plaintiff had not been prejudiced by his absence from the bench during the unrecorded conferences.

Plaintiff is in essence arguing for a per se rule which would invalidate a conviction because of an unrecorded conference held with a prospective juror at the bench outside the presence of the defendant, even though the defendant's counsel is present to protect his client's interests. That is not the law in the State of New Hampshire. See State v. Bailey, 127 NHY 416 (1985); State v. Castle, 128 NH 649 (1986). Nor is it the law under applicable federal cases. See the cases cited in the State's memorandum in opposition to plaintiff's petition. Furthermore, as the state argues upon the authority cited in Paragraph 14 of its objection of August 17, 1987 to plaintiff's amended petition, plaintiff's failure to object to the bench

conferences at trial and his failure to perfect a direct appeal of this issue to the Supreme Court are reason enough to reject it as a basis for habeas corpus relief. This first ground of plaintiff's petition is of no merit.

As to the second basis for the petition, between August, 1984 and the beginning of the October, 1985 trial, plaintiff's counsel, Attorney Hemeon, met with plaintiff and plaintiff's wife in more than twelve and probably in as many as fifteen extended conferences. In these meetings, Attorney Hemeon discussed the legal and factual issues of the case with the plaintiff, talked with plaintiff about the witnesses Attorney Hemeon would be calling at trial, prepared an alibi defense with the plaintiff, conferred about whether the plaintiff and his wife would testify at trial, discussed the advisability of having

an interpreter, and generally review the important aspects of the case with his client.

Plaintiff, an Italian immigrant in his mid fifties, emigrated to the United States in 1960, establishing his residence in the area of greater Boston. Plaintiff became a U.S. citizen in 1967. During his years in the United States prior to the Gravel incident, plaintiff established a garage business for the servicing, repair, and sale of automobiles. In addition, he and his wife acquired several income producing properties in Massachusetts in addition to their residence in Malden and their summer house at Silver Lake in Lochmere, N.H. As the States argues, plaintiff's success in business and in acquiring property tends to belie his alleged inability to understand conversational English.

Before emigrating to the United States,

the plaintiff, who was schooled in Italy, spoke and wrote Italian. During his twenty four years in this country before the incident leading to his criminal charges, plaintiff gradually learned to speak English. by the summer of 1984, he could converse in English, was accustomed to listening to English TV and movies, and had several friends with whom he talked only in English.

Although plaintiff testified that in his meetings with Attorney Hemeon he talked only in Italian which his wife translated into English, the court finds, as Attorney Hemeon testified, that in fact all of the conversations which plaintiff and his wife had with Hemeon were conducted in English. At all of these meetings, plaintiff answered responsively and intelligently to the questions Attorney Hemeon asked of him; and at no time did the plaintiff ever inform

Hemeon that he didn't understand the discussions which the two of them and plaintiff's wife were having. In sum, the plaintiff well understood everything that he and his lawyer discussed in English.

It was at Attorney Hemeon's instance that the plaintiff decided to engage an interpreter for his trials. Attorney Hemeon considered it good practice to have an interpreter available at trial in case a matter arose which because of its legal complexity plaintiff might not be able to understand. After Hemeon tried without success to obtain an interpreter on his own, he asked the plaintiff if he knew of someone who could perform that function. Plaintiff and his wife proceeded to get a friend of theirs, Rose Marie Turino, to serve as interpreter in the first two trials. For the October, 1985 trial, they got another friend, Rita D'Amelio, to serve as

interpreter. Plaintiff and his family had known both of these people for about fifteen years, and plaintiff expressly trusted them.

Plaintiff claims that Ms. D'Amelio failed to translate substantial portions of the trial testimony, especially those portions of the victim's testimony and the testimony of others which contained vulgarities. He contends that because of the incompetence of Ms. D'Amelio he could not understand many aspects of the evidence. Plaintiff's claim is incredible for several reasons. First, at the beginning of the first trial, the court took pains to assure that Ms. Turino would be interpreting word for word and that, if there was anything the plaintiff didn't understand in the interpretation or the proceedings, he was to make that known to the interpreter and the court. The plaintiff expressly stated that he understood what the court was directing

and that, if he had a problem comprehending, he would tell the interpreter and the judge.

Second, by the time of the October, 1985 trial, the plaintiff had already heard the testimony of the victim twice before. Given the court's cautionary advice at the first trial and the knowledge which he had about Gravel's testimony from the earlier proceedings, it is highly unlikely that plaintiff would have remained silent if he really couldn't understand parts of the testimony in the third trial, as he claims. Besides the court, Attorney Hemeon had instructed the plaintiff that if there was anything during the trial that he didn't understand, he was to make that fact know to his lawyer. At no time during the October trial did the plaintiff ever tell the court or Attorney Hemeon that he was having any difficulty understanding the testimony.

Third, from the transcripts, the

evidence adduced at the habeas corpus proceeding, and this court's observation of the plaintiff during the three different days of the evidentiary hearing, it is apparent that the plaintiff understands English well enough to have understood the trial testimony in October, 1985, even without the translator. The transcript of the third trial shows that there was occasions when the defendant pre-empted the interpreter and answered questions before she began her translation. There were still other occasions when the plaintiff corrected the interpreter's translation. At each day of the habeas corpus proceeding, a translator was in attendance. A number of times the interpreter neglected to translate substantial portions of testimony, and it was apparent to this court that, in spite of the absence of translation from English into Italian, the plaintiff understood exactly

what was being said.

Fourth, during plaintiff's testimony in the habeas corpus proceeding, this court inquired of the plaintiff how he came to learn that substantial portions of the testimony had not been translated for him at the October, 1985 trial by the interpreter. In response to this question, the plaintiff stated his wife and daughter read the trial transcript and recounted to plaintiff the substance of what it contained. According to plaintiff, this is when he first appreciated the fact that the interpreter had not accurately translated the testimony for him. This court then inquired of the plaintiff what it was precisely that he now understood the transcript contained which he did not understand at the time of the October trial. Plaintiff was unable to point to any specific testimony in the October, 1985 trial which he didn't

understand at the time of trial. His response to this court's question was that at the time of the trial he didn't realize he would go to prison if he were found guilty.

Fifth, at the second trial, plaintiff didn't even intend to use the interpreter. It was only at the court's insistence, in the interest of safety and care, that the interpreter came to be used. Had plaintiff really believed that he would not understand the testimony without an interpreter, he himself would have insisted that there be one to interpret all parts of the proceedings. It is also noteworthy that at the show cause hearing on August 11, 1986, the trial judge expressly stated that he had watched the interpreter translating during the October, 1985 trial, and it didn't appear to him that she was having any trouble with the translation or that the

plaintiff was having any problem understanding the testimony as translated.

As to plaintiff's second ground, this court finds it to be baseless. There was nothing of consequence at the October, 1985 trial which the plaintiff did not understand.

As to plaintiff's third ground, this court's findings and rulings with respect to plaintiff's second ground obviate the necessity of discussing the incompetence of counsel claim because of Attorney Hemeon's alleged failure to secure a competent interpreter. As to the second prong of plaintiff's third ground, since pre-sentence investigation reports are not usually prepared until after verdict in contested cases, Attorney Hemeon believed that there would be a hiatus between a verdict, if it was a guilty one, and the hearing on sentencing. He was unaware and had not been

notified that the presentence investigation report had already been prepared. It was not until the jury returned its verdict of guilty and the court proceeded to sentencing that Hemeon realized that the PSI was available.

Attorney Hemeon asked the court for him to review the PSI with the plaintiff. As plaintiff himself acknowledged at sentencing, the information contained in it was all correct. When Attorney Hemeon informed the court that he was not prepared to address the victim input letter annexed to the report, since he had just seen it for the first time, the court assured the plaintiff and his counsel that he would not consider that letter for purposes of sentencing. Plaintiff claims that Attorney Hemeon should have been prepared to present evidence of plaintiff's lack of a prior criminal record, his good character and

reputation, and his respect for the law, and that at the very least, he should have moved for a continuance in order to have the opportunity to present a mitigation case. Attached to his amended petition of August 3, 1987, are numerous affidavits which plaintiff claims Hemeon could have obtained as the basis for a mitigation case.

The affidavits which plaintiff contends Hemeon could have obtained are substantially to the effect that the plaintiff is a good family man, that he is hard-working and productive, that he is a law-abiding citizen, and that he has a good reputation for honesty, integrity, and caring for people. According to the PSI, plaintiff had no prior record; he is considered to be a good family man, and he is a productive citizen who provides well for his family and children. For the most part, the affidavits plaintiff claims Hemeon could have obtained

are cumulative and essentially corroborate the positive information about the plaintiff contained in the PSI. Notwithstanding this information, the plaintiff was convicted of two very serious sex offenses, the exposure on each being a maximum of seven and a half to fifteen years. Regardless of what Attorney Hemeon might have presented in a mitigation case, the court had the reality of the convictions in front of it. It had presided at three different trials of the case, two of which each lasted three or more days. Even if Hemeon had been afforded the opportunity to present evidence in mitigation, it is unlikely that the result would have been any different. Considering the severity of the offenses, the surrounding circumstances shown by the evidence at trial, and the maximum penalties, the court's sentence was just and appropriate. Regarding argument in

mitigation, considering the court's familiarity with the case, there was little if anything Attorney Hemeon could say to influence the sentence.

In view of all the circumstances, plaintiff has failed to show that Attorney Hemeon's representation at sentencing fell below the objective standard of reasonable competence. Moreover, plaintiff has failed to show that but for the alleged ineffective assistance, the result would have been different. State v. Faragi, 127 NY 1, 4-5 (1985). Plaintiff has accordingly failed to meet his burden on this issue.

As to plaintiff's fourth ground and as stated above, the court informed the plaintiff and Attorney Hemeon that he would not consider the victim input letter attached to the PSI in sentencing the plaintiff. The oral statements of Attorney Fitzgerald at the sentencing were limited to

the impact of the assault on the victim, which had to have been apparent to the court even before Fitzgerald's remarks. moreover, the plaintiff's reliance on Booth v. Maryland, 4th Cr.L.Rptr. 3282 (1987), is misplaced for the reasons stated in the Paragraphs 18 and 19 of the State's objection of August 17, 1987 to plaintiff's amended petition. Furthermore, plaintiff never objected to Attorney Fitzgerald's remarks about the effect of the assaults on the victim, so that he has effectively waived any right to complain about them now. For these reasons, plaintiff's fourth ground is similarly without merit.

As to plaintiff's fifth ground, the court finds, as Carol Massie, the secretary for the Belknap County Attorney's Office, testified, that the report of Officer Kuhns dated August 3, 1984, and the polygraph examination report of Linden Wagner were

sent to plaintiff's counsel by the State in the early fall of 1984. Therefore, the State did not withhold this information from plaintiff as he now claims. Moreover, the claim of the plaintiff that Linden Wagner inaccurately interpreted the polygraph results of the Gravel examination and that the State withheld this information from the plaintiff is unsupported by the credible evidence. The State did not fail to provide the plaintiff with any exculpatory evidence, and no agent of the State withheld from the plaintiff any evidence which he was entitled to receive. Accordingly, plaintiff's fifth ground has no merit.

As to plaintiff's sixth and final ground for habeas corpus relief, plaintiff at no time sought to introduce the Gravel polygraph results at trial. Therefore, plaintiff cannot now attack the rule excluding these results from evidence at

trial. Moreover, even if plaintiff had offered those results and they had been ruled as inadmissible under State v. Ober, 126 NH 471 (1985) and State v. French, 119 NH 500 (1979), plaintiff's challenge to New Hampshire's per se rule would be to no avail for the reasons stated in Paragraphs 20 and 21 of the State's objection of August 17, 1987 to plaintiff's amended petition.

For the foregoing reasons, plaintiff's petition for a writ of habeas corpus is DENIED.

So ordered.

Philip S. Hollman,
Presiding Justice

April 21, 1988

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Pasquale Acierno

v. Civil No. 89-381-D

Michael Cunningham, Warden, New Hampshire State Prison

ORDER

After two mistrials, Pasquale Acierno was convicted on October 21, 1985, of one count of aggravated felonious sexual assault and one count of attempted aggravated felonious sexual assault. He is currently serving two consecutive four-to-eight-year terms, the second of which is suspended pending good behavior.

Acierno seeks a writ of habeas corpus under authority of 28 U.S.C. §2254, arguing that his state trial violated the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, in two ways. First, Acierno

claims he was denied his right to effective assistance of counsel at his sentencing hearing;[1] second, Acierno claims he did not understand crucial parts of the victim's testimony because an interpreter failed to translate certain portions of the state trial proceedings.[2]

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[1] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to "the Assistance of Counsel for his defence." While Strickland v. Washington, 466 U.S. 668 (1984), held that the Sixth Amendment right to counsel applied to Florida's capital sentencing proceedings, it is not entirely settled whether the Sixth Amendment applies to all sentencing proceedings. However, the case law strongly suggests that the Sixth Amendment is applicable. See, e.g., Mempha v. Rhay, 389 U.S. 128, 124 (1967) (dicta indicating counsel required at every state of criminal proceeding where substantial rights may be affected). Moreover, the parties do not dispute this issue. The Court therefore assumes, without deciding, that the Sixth Amendment guaranteed petitioner effective assistance at his sentencing hearing.

[2] Acierno's petition claims that the failure to interpret the victim's testimony violated his Fourteeneth Amendment rights. Reading the petition in conjunction with the record and subsequent filings, petition apparently claims that his inability to understand the victim's testimony violated his Sixth Amendment right "to be confronted with the witnesses against him" as that right is applied to the states through the Due

Petition has exhausted his state remedies. The matter is currently before the court on the motion of respondence Michael J. cunningham for summary judgment.

1. Ineffective Assistant of Counsel

The transcripts of the state court proceedings and Acierno's petition to this court reveal that the following facts are not in dispute.

Immediately after the jury returned its guilty verdicts against petitioner, the trial judge indicated he was ready to proceed with sentencing. Acierno's trial counsel, Attorney Robert L. Hemeon, indicated he was not ready for sentencing because a presentence investigation report ("PSI") on the defendant was not ready.[3]

Process Clause of the Fourteenth Amendment.

[3] The trial transcript refers to a "probation report", while the state order denying a writ of habeas corpus refers to a "presentence investigation report". Both terms clearly refer to

Hemeon had handled five to eight hundred felony cases prior to Acierno's trial, and roughly half of them had gone to trial. Based on his experience, Hemeon believed that the PSI would be prepared after the jury's verdict. Here, however, the prosecutor told the trial judge that the PSI had already been filed and the state was ready for sentencing. Hemeon asked for a recess to review the report with his client. Court reconvened after approximately fifteen minutes. Both Hemeon and the defendant himself stated that the report contained no factual errors. Hemeon did, however, challenge accusations contained in a letter written by the victim's attorney that was attached to the report. The trial judge indicated he would not consider those accusations for purposes of sentencing.

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the same document.

The remainder of the sentencing hearing consisted of a sentencing recommendation by the State, a short statement by the attorney representing the victim, and a short statement by the defendant professing his innocence. The judge then proceeded to sentence petitioner to four to eight years' imprisonment on the aggravated felonious sexual assault charge and four to eight years' imprisonment on the attempted aggravated felonious sexual assault charge. The second sentence was ordered to be served consecutively, but was suspended on good behavior.

It is based on these facts that petitioner claims his counsel was ineffective. The applicable two-part test was established in Strickland v. Washington, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that

counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687. Regarding the required showing of deficiency, a court must look at all the circumstances as they existed at trial, and petitioner must overcome the strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. Id. at 689.

Petitioner has failed to overcome this presumption. the record clearly indicates, and petitioner does not dispute, that PSIs are usually prepared after a verdict is rendered. Thus, the fact that Hemeon was unaware that the report was ready was not an error. At that point, Hemeon asked for--and received--a recess to review the report with

his client. The only other option defense counsel had was to ask for a continuance. However, looking at all the circumstances as they existed at the sentencing hearing, withholding a request for continuance clearly could have been a strategic move on the part of defense counsel. He was facing a trial judge who had sat through two mistrials (including one mistrial that resulted in a guilty verdict), as well as the full trial just completed; Hemeon's impression on the day in question was that the trial judge had a "rather strong determination to proceed" with sentencing. See Transcript of Proceedings, Habeas Corpus Hearing, Aug. 10, 1987, at 86. This Court is not persuaded that counsel's failure to make motions that he deems would be destined for failure means that the representation was ineffective.

Moreover, defense counsel reviewed the

PSI with his client, and they both agreed it was factually correct; counsel also told the court that the report contained accusations regarding prior bad conduct by the defendant and received assurances from the trial judge that these accusations would not be taken into consideration.

Petitioner alleges that counsel failed to call character witnesses at the sentencing hearing who could have bolstered his plea for leniency. Forty-two affidavits were attached to the amended petition for habeas corpus filed in state court. Some of them contain written comments, but they all assert that, given the opportunity to testify, "I would have offered oral and/or written testimony regarding the good character, reputation for peacefulness, integrity and general standing in the community, of Mr. Pasquale Acierno, as part of the sentencing phase of the above-

referenced criminal action." Far from being "massive and powerful evidence", as petitioner contends, a review of these affidavits demonstrates that these character witnesses would have provided nothing more than cumulative testimony about petitioner's good reputation. Similar evidence was contained in the sentencing report already before the court.

The two cases cited by petitioner, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), and Gardiner v. United States, 679 F. Supp. 1143 (D. Me. 1988), do not support his claim that counsel's actions here were tantamount to no representation at all.

In Gardiner, the court found assistance ineffective where counsel failed to speak on his client's behalf at sentencing despite a presentence report presenting a "very bleak" picture of the defendant. Id., 679 F. Supp. at 1146. Here, in contrast, the presentence

report indicated that petitioner was a productive family man with no criminal record.

In Blake, the court found that mitigating evidence existed and that it was reasonably probable that the defendant would have received a lesser sentence but for counsel's lack of preparation. Blake, supra, 758 F.2d at 534. Here, in contrast, it cannot be said that petitioner was prejudiced by counsel's actions at sentencing. Petitioner faced a maximum penalty of fifteen to thirty years, yet he was sentenced to four to eight years on one charge and four to eight years, suspended, on the other. The character evidence proposed by petitioner would have been cumulative, and, given the sentence which could have been imposed, this Court is not persuaded that presentation of such evidence would have resulted in a lighter sentence.

In short, petitioner has failed to meet either prong of the two-part test enunciated in Strickland v. Washington, supra; therefore, respondent's motion for summary judgment is granted, and the petition for a writ of habeas corpus on the ground of ineffective assistance of counsel is denied.

2. Alleged Failure of Interpreter to Completely and Accurately Translate the Proceedings

Petitioner claims that the interpreter at the third trial failed to translate certain portion of the proceedings, particularly the sexually explicit portions of the victim's testimony.[4]

Respondent claims he is entitled to summary judgment on the ground that this claim is improperly before this court due to

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[4] Petitioner is an Italian immigrant who came to this county in 1960 when he was 29 years old. He became a United States citizen in 1967. When he arrived in the United States, he did not speak or write English.

a procedural default. More specifically, respondent claims that petitioner did not object to the interpreter's alleged misconduct at trial and thus, under New Hampshire law, could not raise this issue on appeal. The result, respondent claims, is that petitioner may not obtain federal habeas relief absent a showing of good cause for the failure to raise the issue at trial and evidence of actual prejudice. See Reed v. Ross, 468 U.S. 1, 11 (1984); Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

Respondent's argument might be persuasive but for the fact that it is not clear that there was a procedural default. the record demonstrates that this claim was not presented to either the trial court or the New Hampshire Supreme Court on appeal; however, the claim was reviewed during the state habeas proceedings. It appears then

that the state courts have had a fair opportunity to resolve the issue. See Anderson v. Harless, 459 U.S. 4, 6 (1982); Nadworny v. Fair, 872 F. 2d 1093, 1095 (1st Cir. 1989). No more is required, and therefore the Court reaches the merits of petitioner's claim.

A defendant with no knowledge of English has a right to an interpreter. See, e.g., United States v. Gallegos-Torres, 841 F.2d 240 (8th Cir. 1988); United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970). It is unclear, however, precisely when that right extends to a defendant with some appreciable knowledge of the English language; the matter is within the discretion of the trial court. Perovich v. United States, 205 U.S. 86, 91 (1907); United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); see also Luna v. Black, 772 F.2d 448 (8th Cir. 1985); United States v.

Barrios, 457 F.2d 680 (9th Cir. 1972); United States v. Sosa, 379 F.2d 525, 527 (7th Cir. 1967).

There is substantial evidence that the petitioner had at least a fair working knowledge of the English language at time of trial. He lived in the United States for twenty-four years prior to trial; for several years he owned and operated a garage business that sold, serviced, and repair automobiles; and he was joint owner of some income-producing properties. These business activities show that petitioner had at least some knowledge of the English language.[5] While testifying at trial, petitioner sometimes answered questions before they were translated into Italian, and on at

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[5] Moreover, the petitioner admits he became a United States citizen in 1967; under 8 U.S.C. §1423, he would have been required to demonstrate "an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language...."

least one occasion, he corrected the interpreter. Finally, under 28 U.S.C. §2254(d), written findings of fact made by the state court judge after the state habeas hearing are presumed to be correct, unless the petitioner establishes or it otherwise appears that they are not true. Here, the state court judge held a full evidentiary hearing pursuant to Acierno's petition for a state writ of habeas corpus. The written order contains a specific finding that

> all of the conversations which plaintiff and his wife had with hemeon were conducted in English. At all of these meetings, plaintiff answered responsively and intelligently to the questions Attorney Hemeon asked of him; and at no time did the plaintiff ever inform Hemeon that he didn't understand the discussions which the two of them and plaintiff's wife were having. In sum, plaintiff well understood everything that he and his lawyer discussed in English.

Order on Petition for Writ of Habeas Corpus at 8. The record clearly supports this

conclusion, and petitioner has presented no new evidence to the contrary. Although the trial judge exercised his discretion to allow an interpreter, this Court is not persuaded that an interpreter was constitutionally required. therefore, the alleged failure to interpret certain sexually-explicit testimony does not implicate any of petitioner's constitutional rights.

Even if petitioner had been entitled to an interpreter, the evidence clearly shows that his rights were not violated here. The state court order denying Acierno's petition also made a specific finding of fact that

> from the transcript, the evidence adduced at the habeas corpus proceeding, and this court's observation of the plaintiff during the three different days of the evidentiary hearing, it is apparent that the plaintiff understands English well enough to have understood the trial testimony in October, 1985, even without the translator.

Id. at 10. The record supports this conclusion, and the petitioner has not established otherwise. Therefore, under 28 U.S.C. §2254(d), this finding of fact is presumed to be correct. The Court therefore concludes that petitioner's due process rights were not violated by the translation provided at his trial.

Conclusion

For the foregoing reasons, respondent's motion for summary judgment is granted, and the petition for writ of habeas corpus is denied.

SO ORDERED.

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Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Pasquale Acierno

v. Civil Action No. 89-381-D

Michael Cunningham, Warden, New Hampshire State Prison

JUDGMENT

In accordance with the Order dated April 18, 1990 by Chief Judge Shane DeVine, judgment is hereby entered.

By the Court,

Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Pasquale Acierno

v. Civil No. 89-381-D

Michael Cunningham, Warden, New Hampshire State Prison

O R D E R

Petitioner Pasquale Acierno seeks to appeal to the United States Court of Appeals from the Order of this Court issued under date of April 18, 1990. In said Order, the Court granted the respondent's motion for summary judgment and dismissed the petition for writ of habeas corpus. An appeal from such proceedings is not granted as a matter of right, but requires issuance of a certificate of probable cause. See 28 U.S.C. §2253; Rule 22(b), Fed. R. App. P.

Upon due review of all documents herein filed, the Court herewith finds and rules

that the issues which the petitioner seeks to present on appeal are not debatable among jurists of reason, Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), and I therefore exercise my discretion to deny the request for a certificate of probable cause to appeal herewith.

SO ORDERED.

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Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1446

PASQUALE ACIERNO,
Petitioner, Appellant,

v.

MICHAEL CUNNINGHAM, ETC.,
Respondent, Appellee.

Before

Torruella, Selya and Cyr,
Circuit Judges

ORDER OF COURT

Entered July 17, 1990

The petitioner has failed to make a substantial showing of denial of a federal right. Barefoot v. Estelle, 463 U.S. 880, 893 (1983). The request for a certificate of probable cause to appeal is denied essentially for the reasons stated in the district court's carefully considered order denying the application for a writ of habeas corpus.

By the Court:

Clerk